BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinions of the lower courts, relevant to this petition, are listed chronologically.

(a) Opinion of the Circuit Court of Appeals upon the first appeal. Entered July 8, 1939 (R. p. 11). Reported at 105 Fed. (2d) 878.

(b) Opinion of District Court overruling motions for new trial and for judgment notwithstanding the verdict, at the close of the third and most recent trial. Entered May 5, 1941 (R. p. 285).

(c) Opinion of the Circuit Court of Appeals upon the Second Appeal, remanding case to District Court to reconsider Motion for New Trial. Entered June 24, 1943 (R. p. 316). Reported at 136 Fed. (2d) 821.

(d) Opinion of District Court granting judgment notwithstanding the verdict. Entered August 21, 1943 (R. p. 302). (It should be noted that the order entered by the District Court on Nov. 2, 1944, differs substantially from this memorandum opinion. The actual order not only grants judgment to the respondent, but also grants respondent's motion for new trial. Of course, the new trial will become effective only when the erroneous final judgment is set aside.)

II.

JURISDICTION.

Review is sought of the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered on July 16, 1945, under Section 240, Judicial Code, Title 28, Section 347, United States Code Annotated. It is believed that *Miller v. Hatfield*, 309 U. S. 1, 84 L. Ed. 535, 60 S. C. 374 (1940),

and *Century Indemnity Co. v. Nelson*, 303 U. S. 213, 82 L. Ed. 755, 58 S. C. 531 (1938), show exercise of a similar jurisdiction.

III.

SPECIFICATIONS OF ERROR.

The District Court erred:

(1) In exceeding the bounds of the limited mandate of the Circuit Court of Appeals and rendering final judgment for the respondent, instead of merely ordering a new trial.

The Circuit Court of Appeals erred:

(1) In sanctioning the unlawful conduct of the District Court.

(2) In ordering the District Court to dismiss the action.

IV.

STATEMENT OF THE CASE.

A summary statement of the case is included in the preceding petition under Section I thereof. That statement is hereby adopted and made a part of this brief. It seems unnecessary to burden the Court with a repetition of the essential happenings.

V.

ARGUMENT.

Summary of Argument.

This case almost argues itself. Petitioner believes that simple and clear exposition of the chain of court rulings is all that really is required. Much of that exposition can be in the words of the lower courts in this case.

The argument, therefore, will consist of an examination of the rulings below, plus a brief conclusion dealing with the reasons the writ should be allowed.

The theme of the whole argument is that, although holding openly that the facts presented by the evidence must be decided by a jury, the Circuit Court of Appeals, through procedural sleight-of-hand, has permitted the District Court to deny the petitioner its vital right to a jury verdict.

(a) The Original Decision of the Court of Appeals.

Upon the first appearance of this case before the Circuit Court of Appeals for the Sixth Circuit, the decision of the trial judge in directing a verdict for the defendant, at the end of all the evidence on both sides, was under attack.

The essence of the decision appears in the final paragraphs of the Court's opinion (R. 14) 105 Fed. (2d) 878, at 880:

> "The case presents several questions of fact which required submission to the jury: (1) Whether Thompson went out to assault Corbett, or to have a peaceful talk with him over the threatened lawsuit; (2) whether he expected Corbett to shoot him; (3) whether a reasonable man under all of these circumstances would have expected to be shot. (Citations omitted). A jury might have found either that Thompson was or was not the aggressor, that Thompson was or was not aware of the danger, and that a reasonable man might or might not have anticipated the result.
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> "The insurer contends also that under certain statutes of New Mexico Thompson clearly was the aggressor. The District Court made no finding upon this point and apparently did not consider it. No decisions of the courts of New Mexico are cited. If these statutes apply, this contention also presents a question of fact which should have been submitted to the jury."

Thus the Circuit Court of Appeals made it clear that under the evidence submitted by *both* parties, there were

several questions of fact that required submission to a jury, including the fact of violation of certain Statutes of New Mexico.

(b) Action of the District Court at the Close of the Third and Last Trial.

The case, sent back for a third trial, now produced a verdict for the plaintiff-petitioner. The respondent filed a two-in-one motion, asking for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Both were overruled, judgment entered for the petitioner, and the respondent appealed.

The District Court, in giving its reasons for overruling these motions said, in part (R. p. 287):

> "* * * Since the case was retried on substantially the same evidence as that produced at the last former trial, it seems to this court that to enter a judgment for defendant in spite of the verdict for the plaintiff, or to order a new trial for the reasons assigned, would not be consistent with the opinion of the court of appeals. For that reason the motion is overruled * * *"

In short, the District Court held that the requirement that he submit the case to a jury foreclosed him from granting either the motion for new trial, or the request for final judgment in spite of the verdict, inasmuch as the evidence was the same at both trials.

(c) Action of the Circuit Court of Appeals Upon Further Appeal; Remand to District Court for Ruling Upon Motion for New Trial Only.

Upon appeal to the Circuit Court of Appeals by the respondent, the case was ordered "remanded to the District Court for further proceedings in accordance with the opinion of this court." (Judgment of Circuit Court of Appeals, R. p. 315).

We quote the essential parts of the opinion referred to in the order for mandate (R. pp. 318, 319; 136 Fed. (2) 821, 822):

"As indicated above, the gist of our former opinion was, that 'the case presents several questions of fact which required submission to the jury; * * *' The opinion went no further. See *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553; *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129, 136. It is apparent that the view of the lower court was that our former opinion required it not only to overrule the motion for judgment n.o.v., but the motion for a new trial as well. This was erroneous. In *Montgomery Ward & Co. v. Duncan, supra* (p. 251) [311 U. S. 243, 250], it is said:

> 'The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, * * * or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.'
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> * * * * *

"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment. This it has not had. It 'is entitled to have the court below weigh all the evidence, and exercise its discretion to see whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, * * *' *Felton v. Spiro, supra* (p. 583). [78 Fed. 576] As pointed out in *Montgomery Ward & Co. v. Duncan, supra*, it is also entitled to have the court determine whether or not it should have a new trial upon any other ground set forth in its motion therefor.

"For this purpose the case must be remanded, with directions to the court below to consider and act in its own discretion upon appellant's motion for a new trial, stating the reasons for his action. The result, whether one way or the other, may be certified to us in a sup-

plemental record, and, along with other uncontroverted issues in the case, will be subject to review here under the procedure outlined in *Montgomery Ward & Co. v. Duncan, supra.* * * *"

It is quite obvious from the foregoing that the case was returned to the District Court *only* for the purpose of its ruling upon the motion for new trial. The Circuit Court made a clear distinction between the motion for new trial, and the motion for judgment notwithstanding the verdict, as is evident in its use of this sentence:

"It is apparent that the view of the lower court was that our former opinion required it not only to overrule the motion for judgment n.o.v., but the motion for new trial as well. This was erroneous."

This opinion also makes it clear that the Court's former decision that the case must go to a jury was by no means modified or changed, but was, on the contrary, reaffirmed.

(d) Action of the District Court Upon Resubmission.

The District Court then ordered (R. p. 307, at p. 309):

"2. That defendant's motion for judgment *non obstante veredicto,* filed November 4, 1940, be, and the same hereby is, granted, and judgment in this cause is hereby rendered for the defendant. Costs are adjudged against the plaintiff.

"3. Subject to the condition that the order for new trial shall become effective only if the foregoing judgment for defendant should be reversed on appeal, defendant's alternative motion of November 4, 1940, for a new trial is granted and a new trial is ordered.

* * *."

Clearly, the District Court in this decision went beyond the mandate of the Circuit Court of Appeals, in granting

judgment for the defendant. All that should or could have been considered was the motion for a new trial.

(e) Final Action of the Circuit Court of Appeals.

The action of the District Court having been included in a supplemental record, the Circuit Court of Appeals made the final order (R. p. 320), which is the subject of the present petition. This order is reproduced in full at page 5 of the foregoing petition. It characterizes the action of the District Court as "equivalent in substance to the granting of a new trial." Thus the Circuit Court of Appeals seems to recognize that the only valid and effective act of the District Court was the granting of the new trial. Nevertheless, the judgment concludes, "remanded with directions to the District Court to dismiss the action."

This final clause knocks the petitioner completely out of court. Instead of the right to a jury trial, the petitioner hears final judgment pronounced against it by the Court. And still the two unreversed and unmodified opinions of this same Circuit Court of Appeals, published in this very case, continue to say that petitioner has a right to have a jury decide the questions of fact involved.

(f) Reason for the Issuance of the Writ.

The Circuit Court of Appeals in its two announced opinions in this case, has held that this petitioner is entitled to a jury determination of certain questions of fact. The Circuit Court of Appeals has in no way receded from these opinions. Nevertheless, it has permitted the District Court to disobey the clear import of its mandate and render judgment against the petitioner without having a jury decide the disputed questions of fact. Surely this is far from the "accepted and usual course of judicial proceedings." Rule 38 (5) (b).

In *Miller v. Hatfield,* 309 U. S. 1, 84 L. Ed. 535, 60 S. C. 374 (1940), certiorari was allowed when an appeal was dismissed for lack of a necessary party. This Court held that a citation should have issued to bring in that party, if he were not already in Court.

In *Century Indemnity Company v. Nelson,* 303 U. S. 213, 82 L. Ed. 755, 58 S. C. 531 (1938), certiorari was granted where the Circuit Court of Appeals refused to consider errors assigned upon special findings because it believed the requests for such findings to have been made too late.

In both of the foregoing cases as well as in *Letulle v. Schofield,* 308 U. S. 415, 84 L. Ed. 355, 60 S. C. 313 (1940), writs of certiorari were allowed where peculiar and unorthodox rulings of Circuit Courts of Appeals resulted, as in the present case, in the denial of substantial and long-respected rights. In addition, in the present case, a comparison of the two opinions of the Circuit Court of Appeals with its final judgment disclosed the most palpable inconsistency and error.

It is respectfully submitted, therefore, that upon its face, this case is one of high irregularity and injustice in the decision of the Circuit Court of Appeals and eminently requires the corrective supervision of this Court.

Respectfully submitted,

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